

DATE: September 23, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16657

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated October 15, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline B (Foreign Influence). Administrative Judge James A. Young issued an unfavorable security clearance decision dated April 22, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge failed to apply the whole person concept in making his decision; (2) whether Applicant was prejudiced by the Administrative Judge's finding that Applicant does not want his colleagues at work to know the details about how he met his wife; and (3) whether the Administrative Judge's conclusions about Applicant's relationships with the foreign relatives of his wife and his brothers are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an

explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues⁽¹⁾

The Administrative Judge found that Applicant is married to a woman from Kazakhstan who has relatives living in Russia, and that two of Applicant's brothers are married to women from Russia -- one of whom is still a Russian citizen and has relatives living in Russia (including a father who is the equivalent of a colonel in a Russian paratroop regiment). The Judge concluded that Applicant's family ties raised security concerns under Guideline B (Foreign Influence) that Applicant had not extenuated or mitigated.⁽²⁾ Applicant challenges the Judge's decision on several grounds.⁽³⁾

1. Whether the Administrative Judge failed to apply the whole person concept in making his decision. Applicant contends the Administrative Judge did not apply the whole person concept in making his decision. In support of this contention, Applicant asserts the Judge "wholly discounted" some evidence and failed to give sufficient or due weight to other evidence. This claim of error is not persuasive.

There is no legal requirement that an Administrative Judge discuss or cite each and every piece of record evidence when making a decision. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3. Neither the Directive nor any generally applicable principle of federal administrative law requires a Judge to explicitly cite and discuss each and every piece of record evidence. Furthermore, there is a rebuttable presumption that a Judge considered all the record evidence unless the Judge specifically stated otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. A party's personal belief, however strongly held, is not sufficient to raise a serious question as to whether a Judge considered the record evidence. Rather, a party must base such a claim on something in the record evidence that would permit a reasonable, disinterested person to fairly question whether the Judge considered the record evidence. *See* ISCR Case No. 02-23979 (August 25, 2004) at p. 4 n.4. If an appealing party wishes to rebut the presumption that the Judge considered

all the record evidence, or demonstrate the Judge's decision is seriously deficient because it does not specifically mention or discuss some particular record evidence, the appealing party must articulate a cogent argument in support of such a claim that is supported by the record evidence, applicable legal principles, or both. *See* ISCR Case No. 01-22134 (August 19, 2004) at p. 4.

Applicant's appeal arguments, viewed individually or cumulatively, are not sufficient to rebut or overcome the presumption that the Administrative Judge considered all the record evidence in this case. The presumption is not rebutted merely because Applicant can cite record evidence that the Judge did not specifically discuss or mention in the decision. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 3. Nor is the presumption rebutted merely because Applicant identifies record evidence that he claims should have been given more weight by the Judge. *See, e.g.*, ISCR Case No. 02-07757 (March 29, 2004) at p. 4. As the trier of fact, the Judge must weigh the record evidence as a whole and make findings of fact and reach conclusions. The Board will not disturb a Judge's weighing of the record evidence unless the appealing party demonstrates the Judge acted in a manner that is arbitrary, capricious, or contrary to law. Applicant has not done so on appeal. Since there is no presumption of error below, and since the foundation for Applicant's "whole person" argument collapses, there is no need for the Board to review the decision below to persuade itself that the Judge engaged in a whole person analysis.

2. Whether Applicant was prejudiced by the Administrative Judge's finding that Applicant does not want his colleagues at work to know the details about how he met his wife. The Administrative Judge found that Applicant does not want his colleagues at work to know the details about how he met his wife (Decision at p. 2). On appeal, Applicant takes exception to that finding. Applicant's claim of error is not persuasive. First, the Judge's challenged finding accurately quotes a passage from an e-mail message that Applicant sent to Department Counsel (Applicant Exhibit P). Second, apart from Applicant's disagreement with the Judge's finding, he fails to articulate how he was prejudiced in any meaningful way by that finding. Applicant's disagreement with the Judge's finding fails to identify any factual or legal error by the Judge.

3. Whether the Administrative Judge's conclusions about Applicant's relationships with the foreign relatives of his wife and his brothers are arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's adverse conclusions about his relationships with the foreign relatives of his wife and his brothers. In support of this challenge, Applicant argues: (a) the Judge erred by stating there is a rebuttable presumption that an applicant has ties of affection for, or obligation to, his spouse's immediate family members; (b) the foreign relatives of his brothers are not relevant to his case; (c) Department Counsel never established the nature and depth of Applicant's relationships with his foreign in-laws; and (d) there is no basis for the Judge to conclude Applicant's ties to the foreign relatives of his wife and his brothers raise security concerns. ⁽⁴⁾

The Administrative Judge's statement that there is a rebuttable presumption that an applicant has ties of affection for, or obligation to, his spouse's immediate family members accurately reflects prior Board rulings. *See, e.g.*, ISCR Case No. 01-03120 (February 20, 2002) at p. 4. Applicant presents no persuasive argument for why the Board should reconsider and modify those rulings. Nor has Applicant shown that it was arbitrary or capricious for the Judge to conclude Applicant had not presented evidence sufficient to rebut the presumption.

Furthermore, it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant's ties with his brothers (who were married to Russian women) were relevant to assessing Applicant's security eligibility under Guideline B (Foreign Influence). *See, e.g.*, ISCR Case No. 01-26347 (January 8, 2004) at p. 4 (not arbitrary or capricious for Judge to conclude that an applicant's ties with in-laws can raise security concerns under Guideline B). Given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that the totality of Applicant's family ties raised security concerns under Guideline B. *See, e.g.*, ISCR Case No. 02-11570 (May 19, 2004) at p. 7 (an Administrative Judge must consider the totality of an applicant's foreign contacts or ties, not just each foreign contact or tie separately).

Applicant's claim that Department Counsel should have established the nature and depth of his relationships with his in-laws not demonstrate error by the Administrative Judge. There is no right to a security clearance, nor any presumption in favor of granting or continuing a security clearance. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6. Applicant has the burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15 to present

evidence to refute, explain, extenuate or mitigate the security concerns raised by the record evidence of his family ties, sufficient to warrant a favorable security clearance decision. Applicant's argument would reassign the burden of proof and impose on Department Counsel an obligation to present direct and objective evidence of a nexus between Applicant's family ties and an unfavorable security clearance decision. Department Counsel does not have such an obligation. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 7. Given the record evidence in this case, the Judge had a rational and legally sufficient basis to conclude the burden of persuasion shifted to Applicant to present evidence to explain, extenuate or mitigate the security concerns raised by the totality of his family ties. Applicant strongly disagrees with the Administrative Judge's conclusions under Guideline B (Foreign Influence), but he fails to demonstrate the Judge committed any factual or legal error in reaching those conclusions.

Furthermore, Applicant's opinions about the security significance of his family ties are not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 02-23336 (May 10, 2004) at p. 5. The Judge has the obligation to weigh the record evidence, draw reasonable inferences, and reach reasonable conclusions about an applicant's security eligibility within the parameters of the Directive. The Judge is not precluded from making an unfavorable security clearance decision just because an applicant denies that his or her conduct and circumstances pose any security concerns.

Given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant had not met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Applicant's appeal arguments do not demonstrate the Judge's conclusion is arbitrary, capricious, or contrary to law.

The Administrative Judge made findings of fact about Applicant's contacts and interactions with relatives of his wife who are citizens of Russia, and with his brothers' wives who are from Russia (including one whose father is an officer in the Russian military). Those findings of fact are supported by the record evidence, and provide a rational basis for the Judge's adverse conclusions under Guideline B. Neither Applicant's disagreement with the Judge's conclusions nor Applicant's argument for an alternate interpretation of the record evidence persuade the Board that the Judge's conclusions under Guideline B are arbitrary, capricious, or contrary to law.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains various factual assertions that go beyond, and seek to supplement, the record evidence. Those assertions constitute new evidence, which cannot be considered by the Board. *See* Directive, Additional Procedural Guidance, Item E3.1.29. A review of the proceedings below shows that Applicant has a fair and adequate opportunity to present evidence for the Administrative Judge to consider in his case. The Board will not consider or address those portions of Applicant's brief that rely on a proffer of new evidence.

2. The Administrative Judge's formal findings in favor of Applicant with respect to SOR paragraphs 1.b, 1.e, and 1.g. are not at issue on appeal. Because the Judge entered a formal finding in favor of Applicant with respect to SOR paragraph 1.b, Applicant's argument about the death of the brother-in-law covered by SOR paragraph 1.b is moot.

3. Applicant's brief contains two sections -- one entitled "Common Knowledge" and the other entitled "National Interest" -- that do not raise any identifiable claim of factual or legal error by the Administrative Judge or violation of the Directive. Applicant's brief also contains a statement about his inability to find a lawyer who specializes in these kinds of cases. However, that statement does not raise any identifiable claim of error by the Judge or violation of the Directive. There is no presumption of error below and the appealing party must raise claims of error with specificity. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why appealing party must raise claims of error with specificity).

4. Some of Applicant's arguments in support of this claim of error are based on factual assertions that constitute new evidence. As noted in footnote 1 of this decision, the Board will not address arguments made by Applicant that are based on new evidence.